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No. 04-1152

Supreme Court, U.S.
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In The Supreme Court of the United States

DONALD H. RUMSFELD,
Secretary of Defense, *et al.*,

Petitioners,

v.

FORUM FOR ACADEMIC
AND INSTITUTIONAL RIGHTS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICI CURIAE BRIEF ON THE MERITS OF U.S. CONGRESSMAN RICHARD POMBO, NEW JERSEY AND PENNSYLVANIA LAW STUDENTS ELIZABETH P. RIZZO, DAVID WASSERMAN, AND DANIEL L. STANTS, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Court of Appeals erred in holding that the Pombo-Solomon Amendment's equal access condition on federal funding violates the First Amendment to the U.S. Constitution and in directing a preliminary injunction to be issued against its enforcement?

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AMICI CURIAE BRIEF OF CONGRESSMAN RICHARD POMBO, NEW JERSEY AND PENNSYLVANIA LAW STUDENTS ELIZABETH P. RIZZO, DAVID WASSERMAN, AND DANIEL L. STANTS, AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this *amici curiae* brief in support of Donald H. Rumsfeld, *et al.*, Petitioners. Pursuant to Supreme Court Rule 37.3(a), this *amici curiae* brief is filed with the written consent of the parties.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

Congressman Richard W. Pombo was sworn in to his seventh term in the United States House of Representatives in January 2005. He represents the Eleventh Congressional District of the State of California, comprising San Joaquin, Alameda, Contra Costa, and Santa Clara Counties. Congressman Pombo has been active in ensuring that the Reserve Officers' Training Corps ("ROTC") is allowed on college campuses and he set a precedent in steering the passage of the Pombo-Solomon Amendment, the legislation at issue here. Congressman Pombo has been rewarded by several organizations for his activism in

[1] Counsel for Petitioners, Donald H. Rumsfeld, *et al.*, and Respondents, Forum for Academic and Institutional Rights, *et al.*, consented to the filing of this *amici* with the Clerk of the Court. In compliance with Supreme Court Rule 37.6, MSLF represents that no counsel for either party authored this brief in whole or in part and that no person or entity, other than MSLF, made a monetary contribution toward the preparation or submission of this brief.

reducing government regulations, taxation, and spending, including the United States Business and Industrial Council, National Taxpayers Union, Americans for Tax Reform, and the U.S. Chamber of Commerce.

Elizabeth P. Rizzo is a resident of the State of New Jersey and a full-time law student at Rutgers University School of Law, a public university in New Jersey. Prior to entering law school, Ms. Rizzo was an inflight training instructor for Continental Airlines. She currently is an officer of the Rutgers University School of Law Federalist Society.

David Wasserman is a resident of the State of New Jersey and a full-time law student at Seton Hall University Law School. Prior to entering law school, Mr. Wasserman worked in the office of a New Jersey Senator, Barbara Buono. He is currently a member of the College Democrats and the Jewish Law Students Association.

Daniel L. Stants is a resident of the State of Pennsylvania and a part-time law student at Duquesne University School of Law. Prior to entering law school, Mr. Stants served as a United States Air Force navigator and has more than 1,800 hours of flight time, including combat. He is currently a published member of the Law Review at Duquesne University School of Law.

MSLF is a nonprofit, public interest legal foundation organized under the laws of the State of Colorado, with its principal place of business in Lakewood, Colorado. MSLF has been a leader in litigation to preserve the rights guaranteed by the U.S. Constitution. Specifically, MSLF has developed expertise in interpreting and applying the constitutional protections afforded freedom of speech, religion, and assembly. For example, MSLF was a party in

Mountain States Legal Foundation v. Colorado, 946 P.2d 586 (Colo. App. 1997), and counsel in *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000), *cert. den. sub nom. Communities For A Great Northwest v. Vaughey*, 534 U.S. 817 (2001). MSLF believes that its expertise on the guarantees of the U.S. Constitution regarding First Amendment freedoms will assist this Court.

SUMMARY OF ARGUMENT

The Court should reverse the decision of the Third Circuit: (1) to restore the only means by which taxpayers may limit or direct spending through their elected representatives; (2) to protect the rights of Congressional Members to represent properly the fiscal and political interests of their constituents and to legislate on matters of vital public policy; (3) because the lower court erred and, in so doing, denied associational rights of students and potential employers at federally funded state and private schools; and (4) because balancing the rights of Congress to exercise its enumerated power of raising an army and the alleged First Amendment rights of Respondents, the Forum for Academic and Institutional Rights ("FAIR"), *et al.*, tips heavily in favor of Congress.

ARGUMENT

I. THE POLITICAL PROCESS AND THE "POWER OF THE PURSE" IS THE TAXPAYERS' ONLY CHECK ON DELETERIOUS GOVERNMENT SPENDING AND MUST BE PROTECTED BY THIS COURT.

For years, this Court has held that, absent some particularized injury, taxpayers have no standing to raise issues with respect to how their tax dollars are appropriated. "The right of a taxpayer to enjoin the execution of a federal appropriation act, on the ground that it is invalid and will result in taxation for illegal purposes, has never been passed upon by this court." *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 486 (1923). "Standing to sue may not be predicated on an interest of the kind which is held in common by all members of the public because of the necessarily abstract nature of injury all citizens share; concrete injury, whether actual or threatened, is that indispensable element of dispute which serves in part to cast it in a form traditionally capable of judicial resolution." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974).

Instead, to exercise this political check on deleterious spending, "[m]embers of Congress . . . are chosen to speak for those who elected them." *U.S. Postal Service v. Hustler Magazine, Inc.*, 630 F.Supp. 867, 871 (D.C. Cir. 1986). "As the framers of the Constitution expressly contemplated, a Senator or Congressman should naturally 'take care to inform himself of [his fellow citizens'] dispositions and inclinations . . . '" *Id.* (citing *The Federalist* No. 35, at 221 (J. Cooke ed., 1961)). "It is this dependence on public opinion that helps to forge 'the strong chords of sympathy between the representatives and the constituent.'" *Id.*

"Besides participating in debates and voting on the Congressional floor, a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents." *Williams v. U.S.*, 71 F.3d 502, 507 (5th Cir. 1995).

> [T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the co-ordinate branches, Judiciary and Executive . . . [S]o necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

Gravel v. U.S., 408 U.S. 606, 653-654 (1972) (citing 8 *The Works of Thomas Jefferson*, at 322 (Ford ed., 1904)).

As such, absent this Court upholding the right of taxpayers to allocate spending through their elected members of Congress, taxpayers are left with no constitutional or fiscal check on the government's allocation of the taxpayers' earnings.

II. MEMBERS OF CONGRESS HAVE A RIGHT AND DUTY TO REPRESENT THEIR CONSTITUENTS ON MILITARY AND FISCAL MATTERS AND ARE ENTITLED CONSTITUTIONALLY TO GREAT DEFERENCE FROM THE COURTS ON SUCH MATTERS.

A. The "Power Of The Purse" Rests With Congress.

> This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.

The Federalist No. 58, at 391 (James Madison) (Benjamin Fletcher Wright ed., 1961).

> Candidates for office engage in heated contests and the victor is he who receives the greatest number of votes from his constituents. These campaigns are run on platforms that include statements of intention and undertakings to promote certain policies.
>
> * * *
>
> These promises are geared, at least in part, to the interests of the Congressman's constituency. Members of Congress may be legally free from dictation by the voters, but there is a residual conviction that they should have due regard for the interests of their States or districts, if only because on election day a Member is answerable for his conduct.
>
> * * *

> Serving constituents is a crucial part of a legislator's ongoing duties. Congressmen receive a constant stream of complaints and requests for help or service. Judged by the volume and content of a Congressman's mail, the right to petition is neither theoretical nor ignored. It has never been thought unethical for a Member of Congress whose performance on the job may determine the success of his next campaign not only to listen to the petitions of interest groups in his State or district, which may come from every conceivable group of people, but also to support or oppose legislation serving or threatening those interests.

U.S. v. Brewster, 408 U.S. 501, 556-557 (1972) (J. White, dissenting).

In representing those constituent interests, "this Court's cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the States. *See, e.g., Oklahoma v. Civil Service Comm'n*, 330 U.S. 127 (1947); *King v. Smith*, 392 U.S. 309 (1968); *Rosado v. Wyman*, 397 U.S. 397 (1970)." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981) (complete cites omitted).

In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress. *Helvering v. Davis*, 301 U.S. 619, 640-641 (1937). Moreover, Congress receives great deference from this Court in conditioning receipt of federal benefits on the recipients' behavior. This is especially true when the conditions required serve to accomplish one of Congress' enumerated powers (such as raising a military). *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987).

The Founding Fathers empowered Congress to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. "Incident to this power, Congress may attach conditions on the receipt of federal funds and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. at 206-207 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (Burger, C.J.). *See also*, *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma v. Civil Service Comm'n*, 330 U.S. at 143-144; *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)).

The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936), wherein the Court, resolving a longstanding debate over the scope of the Spending Clause, determined that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution." "Thus, objectives not thought to be within Article I's 'enumerated legislative fields,' . . . may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. at 207.

B. On Military Matters, Congress Is Entitled To Maximum Deference.

Moreover, this case does not merely involve the customary deference accorded congressional decisions.

Instead, it arises "in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). This Court has recognized consistently Congress' "broad constitutional power" to raise and regulate armies and navies. *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975). Congress has the power "To raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981). In considering a challenge to the selective service laws, this Court noted that, "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *See Lichter v. United States*, 334 U.S. 742, 755 (1948).

Not only is the scope of Congress' constitutional power in this area broad, the lack of competence on the part of the courts is marked. In *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), this Court noted:

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.[2]

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[2] *See also Orloff v. Willoughby*, 345 U.S. 83, 93-94 n.5 (1953); *Rostker*, 453 U.S. at 64-66.

"It is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view." *Chappell v. Wallace*, 462 U.S. at 300-301. The right of Congressman Pombo and other members of Congress to represent the political will of their constituents and so legislate regarding military matters must be retained and the decision of the Third Circuit should be overturned.

III. THE THIRD CIRCUIT ERRED ON THE LAW AND, IN SO DOING, DENIED STUDENTS' ASSOCIATIONAL RIGHTS.

A. The Third Circuit Erred When It Failed To Defer To Congress On This Matter Of Military Importance.

Many members of Congress have warned of the need to remain vigilant and aggressive regarding military recruiting. *See* 149 Cong. Rec. E2081, 2082 (Oct. 17, 2003) (statement of Rep. Skelton) (" . . . many military leaders have expressed their fear that retention and recruiting will decline as troops rotate back home"); 149 Cong. Rec. S12,579, 12,581 (Oct. 15, 2003) (statement of Senator Bingaman) (noting the adverse impact that "prolonged activation [of reservists] has on recruitment and retention").

Moreover, Judge Advocate General ("JAG") officers play a critical role in contemporary military operations. In the military operations of the last decade, JAG officers have: (1) advised commanders on targeting decisions; (2) investigated alleged violations of international law; (3) assisted with the planning and supervision of humanitarian operations; and (4) assisted with the writing of provisional constitutions of emerging democracies in which the United States has helped to displace despotic regimes. *See* Esther Schrader, *War, On Advice of Counsel*, L.A. Times, Feb. 15, 2002, at A1 (describing the pivotal role played by military lawyers during the Kosovo and Afghanistan wars; *see also* Lt. Col. Marc L. Warren, *Operational Law – A Concept Matures*, 152 Mil. L. Rev. 33 (1996) (discussing the evolving role of military attorneys in an operation setting). A lack of military lawyers could increase the likelihood of "law of war" violations by soldiers and unacceptable civilian collateral damage during military operations.

As Congress has made abundantly clear, the military requires the "best and brightest" for each of its occupation specialties, including its cadre of lawyers, because these missions implicate life or death situations. *See* 149 Cong. Rec. H10,373 (Nov. 5, 2003) (statement of Rep. Myrick) (noting the need to "recruit and retain the best and the brightest . . . to insure a strong, able dedicated American military so that this Nation will be ever vigilant and ever prepared.") If Respondents succeed, equal access will be denied to 92 percent of law graduates currently attending American Association of Law School member institutions.

Ensuring the military's continued access to America's top law schools will allow the military to further its own interest in continuing to receive high-quality legal services for America's men and women in uniform. The value of legal assistance from JAG officers depends, in no small measure, on the caliber of individual attorneys the military is able to recruit to serve in the JAG corps.

The various institutional members of FAIR are also members of the National Association for Law Placement ("NALP"), formed in 1971 to promote the exchange of information and cooperation between law schools and employers. According to NALP's "Principles For Law Schools," "[s]tudents' freedom of choice in career decisions should be protected from undue influences." According to NALP, this includes that "[i]n counseling students, career services officers and others within the law school community should avoid interposing either their own values or institutional interests." http://www.nalp.org/content/index.php?pid=16.

Given Congress' explicitly expressed intent to "remain vigilant and aggressive in military recruiting practices," the fact that this "case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference;"[3] and that "Judicial deference . . . 'is at its apogee' when reviewing congressional decision making . . . in the realm of military affairs,"[4] this Court should defer to Congress and reverse the Third Circuit.

As this Court has explained, "[n]ot only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Rostker,* 453 U.S. at 65. "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence . . . " *Gilligan v. Morgan,* 413 U.S. 1, 10 (1973).

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[3] *Rostker*, 453 U.S. at 64-65.

[4] *Weiss v. United States,* 510 U.S. 163, 177 (1994).

B. Even Absent A Military Matter, The Third Circuit Erred When It Failed To Follow *Dole*.

In *South Dakota v. Dole*, 483 U.S. at 207-208, this Court carefully delineated the duties of Congress when it conditions the receipt of funds. In its opinions, this Court has articulated several general restrictions. "The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of 'the general welfare.'" *Id.* (citing *Helvering*, 301 U.S. at 640-641; *United States v. Butler*, 297 U.S. at 65). However, "[I]n considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress." *Id.* at 207 (citing *Helvering*, 301 U.S. at 640, 645).

"Second, this Court has required that if Congress desires to condition the States receipt of federal funds, it 'must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.'" *South Dakota v. Dole*, 483 U.S. at 207-208 (citing *Pennhurst State School*, 451 U.S. at 17).

"Third, this Court's cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *South Dakota v. Dole*, 483 U.S. at 207-208 (citing *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). *See also, Ivanhoe Irrigation Dist.*, 357 U.S. at 295 ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof").

"Finally, this Court has noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds." *South Dakota v. Dole*, 483 U.S. at 207-208 (citing *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 269-270 (1985); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*); *King*, 392 U.S. at 333 n.34 (1968)).

1. The general welfare and more specific powers were invoked by Congress.

Arguably, Congress does not have to rely only on the General Welfare clause in this case insofar as it is, rather, acting under more definite (and actually enumerated) constitutional powers.[5] This Court has recognized consistently Congress' "broad constitutional power" to raise and regulate armies and navies. *Schlesinger*, 419 U.S. at 510.

Moreover, Congress, by and large, has been entrusted with defining "the general welfare." *Helvering*, 301 U.S. at 640, 645. Further, it is untenable to suggest that Congress providing for the "common defence" of the United States is somehow at odds with the "general welfare," given that both phrases are within the same conjunctive constitutional phrase.[6]

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[5] Congress has the power "To raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *Rostker*, 453 U.S. at 59.

[6] "The Congress shall have Power To . . . provide for the common Defence and general Welfare of the United States . . . " U.S. Const. art. I, § 8, cl. 1.

2. Congress was not ambiguous and the recipients were knowledgeable as to terms requested upon receipt.

This Court has held that:

> legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' See, *Steward Machine Co.*, 301 U.S. at 585-598; *Harris v. McRae*, 448 U.S. 297 (1980).

Pennhurst State School, 451 U.S. at 17.

The federal government was in no way ambiguous as to the restraints placed on funding recipients, especially such that "sophisticated" universities were somehow caught unaware as to congressional requirements offered as a condition of the universities' receipt of federal funds. To the extent Congress was in any way unclear, the U.S. Department of Defense made clear those conditions through the promulgation of regulations, as well as through the sending of letters to the universities specifically detailing the implications of the Pombo-Solomon Amendment. *FAIR v. Rumsfeld*, 390 F.3d 219, 228 (3rd Cir. 2004).

3. The raising of a military is served by the Pombo-Solomon Amendment

The objective to be carried by Congress' conditioning of federal funds is that of raising a military to include critically needed JAG officers. Placing military recruiters where career-seeking potential recruits and potential JAG

officers live and study is related directly to Congress' stated objective.

4. The Pombo-Solomon Amendment is not otherwise constitutionally barred.

The Third Circuit erred in finding independent constitutional bars to Congress' conditional grant of educational funds.

This Court has held that its language in earlier opinions stands for the unexceptionable proposition that the power of the purse may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of Congress' broad spending power. *South Dakota v. Dole*, 483 U.S. at 210-211.

No such claim is made by FAIR here and for good reason: FAIR has not, as a condition of accepting the money, been required to violate anyone's constitutional rights![7] Rather, the schools comprising FAIR, after freely

[7] A more straightforward and honest approach would have been for FAIR to assert associational standing and sue the Department of Defense on behalf of its gay student members against whom the Department of Defense allegedly discriminates (or so FAIR argues implicitly). Absent a suspect class, however, an equal protection claim against the Department's "don't ask, don't tell" policy would be subject only to rational basis scrutiny, which, of course, would be fatal to FAIR's claims. Instead, FAIR creatively cloaked its challenge to the "don't ask, don't tell" policy in First Amendment attire in an attempt to achieve strict scrutiny review. FAIR has engaged in this for obvious reasons; such an attack will fail. *See, e.g., Richenberg v. Perry*, 97 F.3d 256, 261

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exercising their rights to associate with the federal government in exchange for funding, now claim that their own associational rights just exercised were somehow violated. The schools comprising FAIR may hardly be said to have had their rights violated when they agreed, as a term of their "contracts," to be so limited.

Amici believe that much insight may be gleaned and many parallels drawn from this Court's likening of conditional spending to the deeply rooted and time-tested principles of contract law. *Supra* Section III(B). Much as a military member or federal employee could be said to have waived voluntarily certain of his free speech rights as a term in his enlistment or employment contract, so too would others, who choose freely to associate with the federal government, be barred from raising constitutional claims, at least those that they have waived in the terms of their "contracts."

It is, of course, those who are not parties to the contract whose rights may not be violated as a condition of the contract, but those are not the rights that FAIR asserts here. Rather, the schools comprising FAIR attempt to assert their own rights despite their status as a "contracting party." Important here is that no third parties' rights are violated as a result of the "contract" between the federal government and the schools, as would be the case in the Court's examples above ("discriminatory state action or the infliction of cruel and unusual punishment"). *South Dakota v. Dole*, 483 U.S. at 210-211. To deny the

(8th Cir. 1996) ("We join six other circuits in concluding that the military may exclude those who engage in homosexual acts as defined in [10 U.S.C.] § 654(f)(3)(A).").

existence of the contract, however, would be to deny the rights of those taxpayers whose only means of limiting government taxation and spending are through their elected representatives.

Under the Constitution, the federal government certainly could not demand that one negative right be waived in exchange for another; that is, it may not demand that a person choose between free exercise and due process, for example. To do so would simply constitute a violation of the waived right. Of course, this is not what is occurring here. Instead, FAIR is exercising its negative right of free association to claim and benefit from a positive "right" bestowed by the federal government. Apparently lost on FAIR is that the federal government has no obligation, and would be free, at its own discretion, to deny all funding of law schools or, for that matter, all educational institutions. Law schools do not have a constitutional "right" to funds with which to operate at taxpayer expense. The ultimate irony is that an organization that calls itself FAIR wants to ignore its required performance under the "contract" and wants the contract declared void, yet still demands performance by the other party, that is, it wants the money.

It is much more likely that the schools comprising FAIR violate the constitutional rights of others by failing to abide by their "agreement" with the federal government. For example, a state school's non-acquiescence to the terms of its own contract with the federal government not only breaches that agreement but, in so doing, denies the free speech rights of federal employees (military recruiters) as well as the associational rights of students such as *amici* Rizzo, Stants, and Wasserman. As such, if Rutgers University engages in content-based speech

regulation and denial of associational rights, it runs afoul of the New Jersey Constitution and must stand ready to be sued under that Constitution by both military recruiters and the students whose access to those recruiters has been limited.[8]

Moreover, the constitutional protection afforded speech ensures not only the right to speak but also, as importantly, the right to "hear, learn and know." *Kleindienst v. Mandel*, 408 U.S. 753, 771 (1972) ("The First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know"). Thus, *Amici* Rizzo, Stants, and Wasserman have a constitutional right to hear the speech, both spoken and unspoken, that occurs when military recruiters appear on their campuses. Even if, *arguendo*, FAIR's members had not consented already to the presence of recruiters as a condition of funding, it is beyond cavil that the students' right to hear that speech is at least on par (if not greater) than the right of FAIR's members to bar speech to which they object.[9] That is especially the case here because, just as the dissent at the Third Circuit speculated they were "sophisticated"

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[8] "Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press." N.J. Const. art. I, § 6. "The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances." N.J. Const. art. I, § 18.

[9] FAIR members' claim, with regard to speech, is not truly a plea for the removal of a burden upon their right to speak, but rather is a demand for the imposition of a ban upon the right to speak of those with whom FAIR members disagree.

enough to do,[10] FAIR members and their law professors vigorously exercise their First Amendment rights to excoriate the U.S. Armed Forces whose members are soon to appear on, have just left, or even during their time on campus.

For sophisticated law students such as *Amici* Rizzo, Stants, and Wasserman, their law schools and law professors leave no doubt that: (1) the military engages in activities that they find abhorrent; (2) the activities in which the military engages violate the ethical codes to which they adhere; and (3) they would not admit military recruiters if they did not feel compelled to do so due to the potential loss of federal funds under the Pombo-Solomon Amendment.[11]

Lastly, male students receiving federal financial aid have already expressed a willingness to so associate insofar as the federal government requires draft registration as a condition of individual federal financial aid. *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984).

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[10] "[L]aw school students, and to be sure, their professors, are an extraordinarily sophisticated and well-informed group, who understand perfectly well that their schools admit military recruiters not because they endorse any "message" that may be conveyed by the recruiters' brief and transitory appearance on campus, but because the economic consequences of the [Pombo-]Solomon Amendment have induced them to do so. The likelihood that the military's recruiting will be seen as part of a law school's own message is particularly small when schools can take – and have taken – ameliorative steps to publicize their continuing disagreement with the military's policies and the reasons for their acquiescence in military recruiting. *FAIR v. Rumsfeld*, 390 F.3d at 257 (Circuit Judge Aldisert, dissenting).

[11] *Supra* fn 8. This is also evidenced by FAIR's very filing of this lawsuit.

The schools comprising FAIR exercised their First Amendment rights when accepting federal funds on the terms accompanying those funds. They were free not to do, as at least one college has done. FAIR and its ilk could take a lesson from Hillsdale College, a shining beacon of principle, which has, through exercising its associational rights, chosen not to munch at the federal trough.[12]

IV. EVEN IF, *ARGUENDO*, FAIR'S FIRST AMENDMENT RIGHTS WERE VIOLATED, THOSE RIGHTS ARE NOT ABSOLUTE AND BALANCING THOSE RIGHTS WITH THOSE OF CONGRESS STRONGLY FAVORS PETITIONERS.

Contrasting FAIR's high-minded abhorrence for discriminatory behavior in its Pombo-Solomon amendment challenge with that of their members' assertion to this very Court of a right to discriminate "affirmatively" on the clearly immutable characteristic of race and gender in their admission and professorial hiring policies suggests that no one is abridging FAIR's constitutional right to be wholly inconsistent. *See Grutter v. Bollinger*, 539 U.S. 306 (2003). FAIR argues for its right to be diverse by discriminating against those with immutable characteristics or members of suspect classes while denying Congress the right to adopt policies Congress believes will ensure unit cohesion in the military.

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[12] Hillsdale College has chosen, as matter of principle, not to accept or to allow its students to accept federal financial aid. Through private donors, funds are provided in the form of replacement grants and low-interest student loans. Such awards are in amounts equal to and commonly in excess of the amounts that students eligible for federal aid could receive from federal programs. http://www.hillsdale.edu/admissions/financial_faqs.asp.

But even if, *arguendo*, FAIR's First Amendment rights somehow hung in the balance in this case, any balancing of competing interests weighs heavily in favor of Petitioners. "The protections the First Amendment affords speech and expressive conduct are not absolute. This Court has long recognized that the government may regulate certain categories of expression consistent with the Constitution." *Virginia v. Black*, 538 U.S. 343, 344 (2003). These First Amendment protections may be circumscribed when necessary to further a sufficiently strong public interest, *Greer v. Spock*, 424 U.S. 828, 842-43 (1976) such as Congress' duty and power "[t]o raise and support Armies, . . . provide and maintain a Navy, . . . [and] make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cls. 12-14. *Rostker*, 453 U.S. at 59.

Other judicially sanctified congressional methods of achieving the same goals here speak volumes toward the constitutionality of Congress' conditions on the recipients of taxpayers' money in this case. For example, for a mere fraction of the money it spends on federal financial aid Congress could simply condemn, by eminent domain, office space on every college campus in which to place a recruiting office and the universities would be powerless to stop that action. Certainly, governmental condemnation actions far less related to any genuine "public use" have met constitutional muster in recent years.[13]

[13] *See, e.g., Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Kelo v. City of New London, Connecticut*, ___ U.S. ___, 125 S.Ct. 2655 (2005).

Any associational rights violations claimed by FAIR could be deemed only whimsical in light of this Court's upholding of Section 12(f) of the Military Selective Service Act, which denies federal financial assistance under Title IV of the Higher Education Act of 1965 to male students between the ages of 18 and 26 who fail to register for the draft. *Selective Service System*, 468 U.S. 841 (1984) (held constitutional when challenged on other grounds). If Congress may condition an individual student's right to receive federal financial aid on his having personally registered for the draft, certainly Congress may condition institutional funds on recruiters being given equal treatment with respect to other employers. In fact, the constitutionality of past conscription itself demonstrates that even potential students' First Amendment rights to associate freely stand no chance, on balance, when up against Congress' power to raise an army.

Even if, *arguendo*, on balance the alleged First Amendment rights trumped Congress' constitutionally explicit power to raise an army, it is the infringement of law students' freedom to associate and "right to hear speech" that are implicated by FAIR's attempt to deny equal access to military recruiters. "The corollary to the guarantee of free speech is that 'there be full opportunity for everyone to receive the message.'" *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 607 (2nd Cir. 1988) (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J. concurring)).

"A listener's interest enjoys protection just as the speaker's interest finds refuge behind the shield of the First Amendment." *Moore v. City of Kilgore, Tex.*, 877 F.2d 364, 370 (5th Cir. 1989). This Court's jurisprudence well supports this understanding of the First Amendment. *See*

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976) (citizens have a right to receive advertising information); *Kleindienst v. Mandel*, 408 U.S. 753, 758, 762-65 (1972) (citizens' right to hear alien's speech); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) (purpose of First Amendment is to preserve an uninhibited marketplace of ideas in which truth ultimately will prevail; thus, the public must be able to hear the ideas and experiences to be able to participate); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (right of workers to hear what labor organizer had to say abridged by state law requiring organizers to register before soliciting union membership); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (freedom of speech necessarily protects the right of citizens to receive information); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (right to receive information and ideas extends to possession of obscene materials in one's own home); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (citizens have First Amendment right to receive communist political publications from abroad). Throughout all of these cases the First Amendment unwaveringly protects the right of *amici* Rizzo, Stants, and Wasserman to receive information and ideas.

Certainly if citizens have a First Amendment right to receive communist political publications and obscene materials, the receipt of information relating to national security by potential JAG officers from military recruiters deserves as much protection. "There is no support for the proposition . . . that a teacher's academic freedom or a student's right to hear may be abridged simply because a school board dislikes the content of the protected speech."

Fowler v. Board of Educ. of Lincoln County, Ky., 819 F.2d 657, 669 (6th Cir. 1987) (Circuit Judge Merritt dissenting).

CONCLUSION

The Court should grant *certiorari*. Only by so doing may the Court restore the sole means by which taxpayers may challenge deleterious spending; that is, through their elected representatives and the political process. Moreover, the rights of Members of Congress to represent those interests of vital public policy must be restored. Further, this Court should grant *certiorari* because the lower court erred and, in so doing, denied associational rights of prospective employers at federally-funded state and private schools as well as denied improperly the rights of students to associate and to "hear, learn and know" that which the military recruiters have a First Amendment right to convey on campus. Finally, on balance, FAIR's tenuous and non-absolute First Amendment claims pale in comparison to Congress' right to exercise its enumerated power of raising a military.

Respectfully submitted,

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